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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MENG YAN,

Plaintiff and Respondent,

v.

TTS (USA) TRAVELING CO.
LTD.,

Defendant and Appellant.

B282438

Los Angeles County
Super. Ct. No. BS159393

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark A. Borenstein, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Offices of Paul M. Ma and Paul M. Ma for Defendant and Appellant.

Law Offices of Steven P. Chang, Steven P. Chang and Heidi M. Cheng for Plaintiff and Respondent.

INTRODUCTION

When the labor commissioner denied her claims for unpaid wages, expenses, and penalties, plaintiff and respondent Meng Yan appealed the decision and received a trial de novo in the superior court, where she prevailed. As part of the subsequent judgment, the court awarded her attorney's fees and costs. Defendant and appellant TTS (USA) Traveling Co. Ltd. appeals from that judgment.

We are asked to decide whether Labor Code section 98.2 is the exclusive statute authorizing an award of attorney's fees and costs to a prevailing employee following the employee's appeal from the labor commissioner's order or decision. We conclude it is—and that it is a one-way fee-shifting provision that does not authorize attorney's fees for a prevailing appellant, even when the appellant is the employee. We therefore reverse the portion of the judgment awarding attorney's fees and costs to plaintiff and remand with directions. In all other respects, we affirm.

BACKGROUND

1. Administrative Hearing

On January 15, 2015, plaintiff filed a complaint with the labor commissioner alleging seven wage claims against defendant.¹ A hearing was held on September 9, 2015. On November 12, 2015, the commissioner entered a decision in favor of defendant, awarding plaintiff nothing. The decision was served on November 13, 2015.

¹ Because the issue before us is a pure question of law, we do not address the facts underlying these claims.

Plaintiff appealed to the Los Angeles Superior Court under Labor Code section 98.2.²

2. Superior Court Proceedings

After a six-day bench trial, the matter was submitted on January 20, 2017. On February 28, 2017, the court issued an order after trial in which it found plaintiff was entitled to \$3,115.26 in waiting time penalties, \$3,100.30 in rest period premiums, and \$250 in reimbursable expenses. But the court rejected plaintiff's other claims, holding that she was not entitled to either overtime pay or meal premiums. The court also awarded plaintiff prejudgment interest and "reasonable attorneys' fees and costs, to be assessed by motion."

On March 15, 2017, plaintiff filed a motion seeking \$68,317.50 in attorney's fees under sections 218.5, 1194, and 2802. Defendant opposed the motion, arguing that section 98.2 was the exclusive statute for awarding attorney's fees and costs in appeals from decisions by the labor commissioner—and that the statute did not authorize fees or costs for successful appellants.³

On May 26, 2017, after a contested hearing, the court ruled that attorney's fees were authorized under sections 216.5 and 280.2.⁴ It awarded plaintiff \$22,251.60 plus costs.⁵ On June 21,

² All undesignated statutory references are to the Labor Code.

³ Defendant also filed a motion to set aside the attorney's fees award on the same grounds. The court denied the motion.

⁴ The Labor Code does not contain either of these provisions. It appears the court meant to refer to section 218.5, which provides attorney's fees to the prevailing party in a civil wage action, and section 2802, which provides that an "employer shall indemnify his or her employee for all

2017, the court entered a \$32,489.80 judgment for plaintiff—\$6,465.56 in damages, \$1,516.89 in prejudgment interest, \$22,251.60 in attorney’s fees, and \$2,255.75 in costs.

Defendant filed a timely notice of appeal. (Cal. Rules of Court, rule 8.104(d)(2) [“The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.”]; *In re Ricky H.* (1992) 10 Cal.App.4th 552, 558 [“Typically, premature appeals are deemed to be timely when the decision being appealed from has been made preliminarily, but is not yet final.”].)

DISCUSSION

Defendant contends the court erroneously awarded attorney’s fees and costs to plaintiff. We agree.

“ ‘On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney

necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties,” including any attorney’s fees incurred to enforce that provision (§ 2802, subds. (a), (c)).

⁵ The fee award was calculated as follows: The court cut 42.2 hours (\$12,690) from the \$68,317.50 fee request based on duplicative and unnecessary work, resulting in a \$55,627.50 lodestar. The court then reduced the lodestar by 60 percent because it had “essentially rejected most of the testimony of Plaintiff, the results at trial were substantially less [than] that requested and the attorneys fee request is based on minimal testimony concerning rest periods and business expenses”

fees and costs in this context have been satisfied amounts to statutory construction and a question of law.’” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

“[I]f an employer fails to pay wages in the amount, time, or manner required by contract or statute, the employee may seek administrative relief by filing a wage claim with the commissioner or, in the alternative, may seek judicial relief by filing an ordinary civil action for breach of contract and/or for the wages prescribed by statute.” (*Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 946 (*Post*).)

The administrative remedy is governed by section 98, which “includes remedial procedures for adjudicating wage claims, enforced by the Division of Labor Standards Enforcement under the direction of the commissioner. It states that the commissioner ‘shall have the authority to investigate employee complaints.’ [Citation.] The commissioner ‘may provide for a hearing in any action to recover wages, penalties, and other demands for compensation.’ [Citation.]” (*Post, supra*, 23 Cal.4th at p. 946.) The commissioner may hold a hearing (known as a Berman hearing), which is “designed to provide a speedy, informal, and affordable method of resolving wage claims,” and to “‘avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims.’” (*Id.* at pp. 946–947.) After the commissioner issues a ruling, the parties may seek review by filing an appeal to the superior court, which hears the matter de novo, granting no weight to the commissioner’s decision. (*Id.* at pp. 947–948; § 98.2, subd. (a).)

Section 98.2, subdivision (c), provides: “*If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal*, the court shall determine the costs and reasonable

attorney's fees incurred by the other parties to the appeal, and assess that amount as a cost *upon the party filing the appeal*. An employee is successful if the court awards an amount greater than zero." (§ 98.2, subd. (c), italics added.)

“This provision thereby establishes a one-way fee-shifting scheme, whereby unsuccessful appellants pay attorney fees while successful appellants may not obtain such fees. [Citation.]’ ” (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1129 (*Sonic*)). Put another way, the statute “is not a prevailing party fee provision, instead it is a one-way fee-shifting scheme that penalizes an unsuccessful party who appeals the commissioner’s decision.” (*Arias v. Kardoulis* (2012) 207 Cal.App.4th 1429, 1435 (*Arias*)).

The statute’s clear purpose is to “act[] as a disincentive to appeal the commissioner’s decision” (*Arias, supra*, 207 Cal.App.4th at p. 1438) and to “discourag[e] unmeritorious appeals of wage claims, thereby reducing the costs and delays of prolonged disputes, by imposing the full costs of litigation on the unsuccessful appellant.” (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 376, citing *Dawson v. Westerly Investigations, Inc.* (1988) 204 Cal.App.3d Supp. 20, 24.) In so doing, the statute protects employees from being “saddled with the employer’s attorney fees and costs unless the employee appeals from a Berman hearing award and receives a judgment of zero on appeal.” (*Sonic, supra*, 57 Cal.4th at p. 1130.)

As discussed, however, this administrative procedure is not an aggrieved employee’s only remedy. (*Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal.App.4th 212, 220 (*Sampson*)). “The employee may [instead] seek judicial relief by filing a court action against the employer for breach of contract

and/or for the wages prescribed by statute. (§§ 218, 1194.) Section 218 authorizes an employee or his or her assignee to ‘sue directly’ for any unpaid wages or penalty owed under the Labor Code. Section 1194 provides an additional remedy to file a civil action to resolve unlawful failure to pay minimum wage and overtime compensation.” (*Ibid.*, fn. omitted.) And, “in contrast to” section 98.2, section 218.5 “ ‘provides that in civil actions for nonpayment of wages initiated in the superior court, the “prevailing party” may obtain attorney fees.’ ” (*Sonic, supra*, 57 Cal.4th at p. 1129.)

“The employee must weigh the benefits and risks of the two options the Legislature has established ... and choose one or the other option.” (*Sampson, supra*, 117 Cal.App.4th at p. 228.) She may not pick and choose the best of each—choose to receive “the benefits of the administrative remedy, that is the prompt payment of wages, *and* the benefits of recovering all [her] attorney fees to prosecute [her] claim under the judicial remedy. We therefore conclude that if an employee pursues an administrative remedy under section 98 ... the sole right to recover attorney fees is governed by section 98.2, subdivision (c)[.]” (*Id.* at p. 229, italics added.) Accordingly, the court erred by awarding fees and costs to plaintiff under sections 218.5 and 2802, which apply only when an employee forgoes the administrative remedy in favor of the judicial remedy.

Plaintiff asks us to adopt the reasoning of *Eicher* and hold that she is entitled to fees under sections 218.5 and 2802. (*Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363 (*Eicher*)). In that case, the plaintiff employee prevailed in a trial de novo in the superior court after an unsuccessful Berman hearing. (*Id.* at p. 1368.) The court awarded him attorney’s fees

under “section 1194, which allows a prevailing employee to recover attorney’s fees in a ‘civil action’ for unpaid overtime compensation.” (*Id.* at p. 1378, fn. omitted.) On appeal, the defendant employer argued the trial court exceeded its authority “because section 1194 does not apply to section 98.2 ‘appeals’ from administrative decisions, and section 98.2 [did] not authorize fees in [that] case.” (*Ibid.*, fn. omitted.) The reviewing court held that because the trial de novo was an “action” within the meaning of section 1194, the fee award was proper notwithstanding section 98.2. (*Eicher*, at pp. 1381–1384.) It reasoned that “while section 98.2 does not authorize fees for successful appellants, it does not necessarily prohibit those persons from obtaining fees under another statute such as section 1194.” (*Id.* at p. 1383.)

Certainly, *Eicher* has not been expressly overruled. But in the years since the opinion was published, the Supreme Court has clarified its views on this topic—and it does not agree with *Eicher*’s reasoning. (*Sonic, supra*, 57 Cal.4th at pp. 1127–1130.) As the Supreme Court explained, section 98.2, subdivision (c), “ ‘establishes a one-way fee-shifting scheme, whereby unsuccessful appellants pay attorney fees while successful appellants may not obtain such fees. [Citation.]’ ” (*Id.* at p. 1129.) “This rule differs from section 218.5, which provides for attorney fees for the ‘prevailing party’ in wage actions initiated in the superior court.” (*Id.* at p. 1130.)

“[O]ur Supreme Court’s decisions bind us, and [even] its dicta command our serious respect.” (*Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 66; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [“Courts exercising inferior

jurisdiction must accept the law declared by courts of superior jurisdiction”].) As such, we decline to follow *Eicher*.

DISPOSITION

The attorney’s fees award is reversed and the matter is remanded with directions to modify the judgment in accordance with the views expressed in this opinion. In all other respects, we affirm.

TTS (USA) Traveling Co. Ltd. shall recover its costs on appeal.

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LAVIN, Acting P. J.

WE CONCUR:

DHANIDINA, J.

MURILLO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.